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Supreme Court, U.S.
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No. 94-125

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MARINE TOWING, INC., *et al.*,
Petitioners,

v.

SPHERE DRAKE INSURANCE *plc*,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Respondent, Sphere Drake Insurance plc ("Sphere Drake"), disagrees with Petitioners' statement of the questions presented for review. The sole question presented for consideration is:

1. Whether the United States Court of Appeals for the Fifth Circuit and the district court correctly found that Petitioners were bound by a valid and enforceable agreement in writing to arbitrate?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	6
THE FIFTH CIRCUIT AND THE DISTRICT COURT CORRECTLY FOUND THAT PETITIONERS WERE BOUND BY A VALID AND ENFORCEABLE AGREEMENT IN WRITING TO ARBITRATE	6
CONCLUSION	15

TABLE OF AUTHORITIES

Cases Page

Case International Co. v. T.L. James and Co., Inc., 907 F.2d 65 (8th Cir. 1990) 12

Concourse Village, Inc. v. Local 32E, Service Employees International Union, 822 F.2d 302 (2d Cir. 1987) 6

Genesco, Inc. v. T. Kakinchi and Co., Ltd., 815 F.2d 840 (2d Cir. 1987) 9

Heinhuis v. Venture Associates, Inc., 959 F.2d 551 (5th Cir. 1992) 9, 10

In re Medscope Marine Ltd., 972 F.2d 107 (5th Cir. 1992) 5

Ledee v. Ceramiche Ragno, 684 F.2d 184 (1st Cir. 1982) 7

Matter of Chung and President Enterprises, 943 F.2d 225 (2d Cir. 1991) 6

Moses H. Cone Memorial Hospital v. Mercury Construction, 460 U.S. 1, 103 S.Ct. 927 (1983) 6

Par-Knit Mills v. Stockbridge Fabrics Co., 636 F.2d 52 (3rd Cir. 1980) 12

Sedco v. Petroleos Mexicanos Mexican National Oil Co. (PEMEX), 767 F.2d 1140 (5th Cir. 1985) 7, 9, 10, 11

Sen Mar, Inc. v. Tiger Petroleum Corp., 774 F. Supp. 879 (S.D.N.Y. 1991) 12, 13

Sphere Drake Insurance plc v. Marine Towing, Inc., 16 F.3d 666 (5th Cir. 1994) 3, 9

T & R Enterprises, Inc. v. Continental Grain Company, 613 F.2d 1272 (5th Cir. 1980) 13

Statutes

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S., No. 6997, 9 U.S.C. §§ 201, *et seq.*.. *passim*

9 U.S.C. § 205 4

28 U.S.C. § 1331 5

Rules and Other Authorities

Inter-American Convention on International Commercial Arbitration 13

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Sphere Drake Insurance plc ("Sphere Drake"), submits that there is no basis for granting a writ of certiorari in this case. The district court correctly held that a valid contract containing an arbitral provision need not be signed to constitute an agreement in writing under The Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("The Convention"), 21 U.S.T. 2517, T.I.A.S., No. 6997, codified as 9 U.S.C. §§ 201, *et seq.* In affirming the district court's decision, the court of appeals correctly determined that there was a valid and enforceable agreement in writing to arbitrate and that the district court properly compelled arbitration. Furthermore, the court of appeals correctly denied petitioners' (Marine Towing, Inc., et al., "Marine Towing") Petition

for Rehearing and the Suggestion for Rehearing En Banc. The decisions of the court of appeals and the district court neither raise any unsettled issues warranting this Court's attention, nor conflict with any decision of this Court or any United States Court of Appeals. Petitioners have presented no compelling reason for granting certiorari to review the carefully reasoned, clear and unequivocal opinions of the courts below. Petitioners' application for a writ of certiorari should, therefore, be denied.

STATEMENT OF THE CASE

Petitioners' statement of the opinions, judgments and orders below, at pages 1-2 of Marine Towing's Writ Petition, correctly recount the procedural history of this case. In addition, some of the relevant facts are set forth in the decision of the Fifth Circuit, which is reproduced as an appendix to Marine Towing's Writ Petition. However, respondent restates the pertinent facts as follows:

This Writ Petition stems from an action to compel arbitration and stay litigation in one of a series of related federal and state court litigations arising out of the sinking of the M/V ST. JUDE. The M/V ST. JUDE sank in the Mississippi River on 14 March 1992, with the loss of four crewmembers. The M/V ST. JUDE was owned and operated at all relevant times by Marine Towing.

At the time of the sinking, the M/V ST. JUDE was purportedly covered by a marine protection and indemnity policy issued by Sphere Drake. In the fall of 1991, Marine Towing had requested its local insurance agents, Alfred Schade, Eric Schade and Schade & Co., Inc. (collectively referred to as "Schade"), to obtain protection and indemnity ("P&I") coverage for the M/V ST. JUDE and three other vessels. *See* Affidavit of Neil Drummond Andrew Bell, forming part of the district court record, and lodged with the United States Supreme Court. Schade

approached American E&S Insurance of Texas, Inc. ("American E&S"), who, in turn, contacted Robert Barrow Ltd. ("Barrow"), a London insurance broker, for the purpose of obtaining quotes on the London insurance market for the marine P&I coverage requested by Marine Towing. *Id.* Acting as Marine Towing's London insurance broker, Barrow requested quotes from Sphere Drake in September 1991 for coverage pursuant to Sphere Drake policy wording SD 350, Class 1, which, at clauses 51 through 53, provided that all disputes between Sphere Drake and its assureds shall be arbitrated in London. *Id. See also* Sphere Drake Policy, forming part of the district court record, and lodged with the United States Supreme Court. Barrow initially requested that Sphere Drake quote coverage on the basis that Marine Towing would employ sixteen (16) crewmembers overall on its four vessels. Later, Barrow requested that Sphere Drake provide an alternative quote for coverage based on Marine Towing employing twelve (12) crewmembers overall on its four vessels. *See* Bell Affidavit.

On 8 October 1991, after negotiations between Marine Towing's London insurance broker and Sphere Drake, Barrow submitted its broker's "slip" requesting coverage pursuant to Sphere Drake policy wording SD 350, Class 1 and warranting twelve (12) crew overall on its four vessels. *Id.* at ¶ 7. Sphere Drake bound coverage for Marine Towing on those terms by dating and stamping Barrow's "slip" on 8 October 1991. *Id.* Sphere Drake delivered Certificate of Insurance No. 91SBAEP00227, together with a full copy of the Sphere Drake policy, to Barrow on 10 January 1992. *Id.* at ¶ 8. Schade, Marine Towing's insurance agent, received the Sphere Drake policy containing the crew limitation warranty, the arbitration provision and the other terms and conditions of the insurance contract in January 1992.[1] While Marine Towing now

[1] *Sphere Drake Ins. plc v. Marine Towing, Inc.*, 16 F.3d 666, 667 (5th Cir. 1994); Petitioners' Appendix "A," 1a; Admission by Marine Towing's counsel at Appellate Argument on 4 January 1994; Marine Towing's Original Appellate Brief, p. 4.

claims Schade never provided it with a copy of the Sphere Drake policy, this agent's receipt of the policy and its actual and constructive knowledge of the policy's terms and conditions were imputed to and binding upon its principal, Marine Towing. Neither Schade nor Marine Towing objected to any of the terms of the Sphere Drake insurance policy before the 14 March 1992 sinking of the M/V ST. JUDE.

Sphere Drake's investigation into the sinking of the M/V ST. JUDE on 14 March 1992 revealed that Marine Towing had, in clear violation of the express crew limitation warranty in the policy, employed more than twelve (12) crew overall on its four vessels for several months prior to, and on the day of, the ST. JUDE sinking. Based on Marine Towing's violation of the crew limitation warranty, Sphere Drake advised Marine Towing that it was denying coverage for the sinking of the M/V ST. JUDE. Disregarding the arbitration provision in the policy, Marine Towing sought a declaratory judgment in Louisiana state court that Sphere Drake owed it P&I coverage in connection with the sinking of the M/V ST. JUDE. Marine Towing also alleged an alternative cause of action against Schade for damages resulting from Schade's breach of its duties and obligations as an agent in the event Sphere Drake successfully voided the policy.

Sphere Drake removed Marine Towing's Louisiana state court action to the United States District Court for the Eastern District of Louisiana on 1 May 1992, and that action was docketed in the district court as Civil Action 92-1509. Sphere Drake maintained that because the insurance policy forming the basis of Marine Towing's claims contained an arbitration provision, this matter was covered by The Convention, which allowed removal under 9 U.S.C. § 205. On 29 May 1992 and 1 June 1992, Marine Towing and Schade respectively moved to remand C.A. 92-1509. Marine Towing and Schade alleged that the district court lacked subject matter jurisdiction

because there was no agreement in writing to arbitrate within the meaning of The Convention and, alternatively, that the removal was procedurally defective because Sphere Drake had failed to obtain consent from Schade, the other defendants, to the removal. On 18 November 1992, the district court remanded C.A. 92-1509, holding that although it had subject matter jurisdiction under The Convention, the removal was procedurally defective due to Sphere Drake's failure to obtain Schade's consent.[2]

On 16 June 1992, well before the remand of the removed case, Sphere Drake filed a petition in federal court to compel arbitration and for a stay of all litigation. Sphere Drake contended that the enabling legislation in 9 U.S.C. § 201 *et seq.* provided the United States District Court with subject matter jurisdiction, pursuant to 28 U.S.C. § 1331. On 29 July 1992, Marine Towing moved to dismiss the action, arguing that the court lacked jurisdiction both because of the remand of the removed case and because Marine Towing claimed there was no agreement to arbitrate under The Convention. On 28 December 1992, the district court denied Marine Towing's motion, ordered arbitration, and stayed all litigation between the parties. Marine Towing appealed the district court's ruling. The Fifth Circuit affirmed the district court's finding that there was an agreement in writing to arbitrate and held that the district court had properly compelled arbitration. Marine Towing filed a petition for rehearing and on 22 April 1994, the Fifth Circuit denied the petition for rehearing and for rehearing en banc.

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[2] While Sphere Drake maintains the district court erred in holding that the consent of all defendants is required in a removal of a state court case to federal court pursuant to The Convention, appellate review of this remand order was not available under existing law. *In re Medscope Marine Ltd.*, 972 F.2d 107 (5th Cir. 1992).

REASONS FOR DENYING THE WRIT

THE FIFTH CIRCUIT AND THE DISTRICT COURT CORRECTLY FOUND THAT PETITIONERS WERE BOUND BY A VALID AND ENFORCEABLE AGREEMENT IN WRITING TO ARBITRATE.

The sole question presented for review is whether the courts below correctly found that a valid contract containing an arbitral clause constitutes an agreement in writing under The Convention. This issue was considered and discussed in the opinions of both the district court and the court of appeals.[3] This Court's review of the 26 February 1993 arbitration order is "quite limited" in view of the rule that "all doubts must be resolved in favor of arbitrability." *Matter of Chung and President Enterprises*, 943 F.2d 225, 229 (2d Cir. 1991), quoting *Concourse Village, Inc. v. Local 32E, Service Employees International Union*, 822 F.2d 302, 304 (2d Cir. 1987), and citing *Moses H. Cone Memorial Hospital v. Mercury Construction*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 941-42 (1983). The courts below held that the arbitration provision in the Sphere Drake policy constituted a valid "agreement in writing" to arbitrate under The Convention, and that Marine Towing was therefore bound to arbitrate this marine insurance contract dispute. This holding is correct as a matter of law.

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[3] Petitioners filed a Petition for Rehearing in the court of appeals which included arguments and citations not previously made to the district court or the court of appeals. The Petition for Writ of Certiorari presently before this Court is an almost verbatim reproduction of the Petition for Rehearing which was denied, without written reasons, by the court of appeals. Although the courts below obviously did not specifically address arguments which were made subsequent to the issuance of their written opinions, the sole relevant issue decided by the lower courts and now presented for review remains whether an arbitral clause in a valid contract constitutes an agreement in writing under The Convention. As the Fifth Circuit properly determined in denying the Petition for Rehearing, which is now reasserted as a Petition for Writ of Certiorari, Petitioners' arguments are without merit.

In *Sedco v. Petroleos Mexicanos Mexican National Oil Co. (PEMEX)*, 767 F.2d 1140 (5th Cir. 1985), the Fifth Circuit held that:

> The Convention contemplates a very limited inquiry by courts when considering a motion to compel arbitration:
>
> 1. Is there an agreement in writing to arbitrate the dispute; in other words, is the arbitration agreement broad or narrow;
> 2. Does the agreement provide for arbitration in the territory of a Convention signatory;
> 3. Does the agreement to arbitrate arise out of a commercial legal relationship;
> 4. Is a party to the agreement not an American citizen?

767 F.2d at 1144-45, citing *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 185-86 (1st Cir. 1982). The Court in *Sedco* held that if the above-listed requirements were met, arbitration is mandatory, and the district court must order arbitration. 767 F.2d at 1145.

In the instant case, there was no dispute concerning the last three of the four *Sedco* factors: the arbitration provision provides for arbitration in London, England, a signatory to The Convention; the arbitration provision arises out of a marine insurance contract, which is a commercial legal relationship; and Sphere Drake is not an American citizen. The only disputed issue raised by Marine Towing in the district court, and in the court of appeals, was whether the Sphere Drake policy's arbitration provision consitutes an "agreement in writing to arbitrate" under The Convention.

The Convention does not narrowly define "agreement in writing," in Article (II), § 2:

> The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agree-

> ment, signed by the parties or contained in an exchange of letters or telegrams.

Based on that language, the district court found that The Convention gives rise to at least three types of enforceable arbitration agreements: (1) an arbitral clause in a valid contract; or (2) an arbitration agreement signed by the parties; or (3) an arbitration agreement contained in an exchange of letters or telexes. (*See* Petitioners' Appendix "D," 15a.) The district court then concluded that the arbitration provision in the Sphere Drake policy at issue in this case satisfied both (1) and (3) above. Specifically, the district court found that because the arbitration provision was contained in a valid contract, and the contract was not induced through fraud, the arbitration clause must be enforced. Alternatively, the district court held that there was a second, although unnecessary, ground for the court's ruling that an agreement in writing existed in this case. The district court found that Sphere Drake's act of stamping Barrow's "slip" requesting coverage under the SD 350, Class 1 policy language, which included the arbitration provision, constituted the requisite "exchange of letters" under Article II, § 2 of The Convention. *Id.*

On appeal, the Fifth Circuit found that the arbitration clause in the Sphere Drake policy constituted a valid and enforceable agreement in writing under The Convention. (*See* Petitioners' Appendix "A," 1a.) The appellate court specifically rejected Marine Towing's argument that an arbitration clause in a valid contract can only be enforced under The Convention if the contract is signed:

> Because what is at isuse here is an arbitral clause in a contract, the qualifications applicable to arbitration agreements do not apply. A signature is therefore not required.

The Fifth Circuit concluded that "[t]he district court properly did not require that the contract containing an arbitral provision be signed to constitute an agreement in

writing under The Convention." *Id.* Accordingly, the court of appeals affirmed the district court's order compelling arbitration.[4]

Petitioners' primary argument is that the "agreement in writing" definition in The Convention should be interpreted to extend the signing requirement to an arbitral clause in a contract. This argument is without merit. The arbitration provision of the Sphere Drake policy is enforceable under The Convention because it was contained in a contract, the validity of which is not at issue.[5] The courts below were clearly correct in holding that there was a valid "agreement in writing" to arbitrate within the meaning of The Convention. The determination that an arbitration provision is part of a valid contract is itself sufficient to mandate arbitration under The Convention. In *Heinhuis v. Venture Associates, Inc.*, 959 F.2d 551 (5th Cir. 1992), the appellate Court held that the sole issue determinative of whether arbitration should be ordered in an insurance dispute was whether the opposing party was a party to the insurance contract:

> We will therefore remand the case for the district court to determine whether NOPI was in fact a party

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[4] The appellate court agreed with the district court that a second ground for supporting this ruling was unnecessary, stating in a footnote: "Additionally, we do not reach the agency arguments pertaining to whether an exchange of correspondence occurred." *Sphere Drake Insurance plc v. Marine Towing, Inc.*, 16 F.3d 666, 669, n.7 (5th Cir. 1994); Petitioners' Appendix "A," 1a.

[5] Not only do petitioners not question the validity of the insurance contract as a whole, they have sought in separate state court litigation *to enforce* the contract. In the context of an arbitration clause, the court must "focus not on whether there was subjective agreement as to each clause in the contract, but on whether there was an objective agreement with respect to the entire contract." *Genesco, Inc. v. T. Kakiuchi and Co., Ltd.*, 815 F.2d 840, 846 (2d Cir. 1987). Absent allegations of fraud in the inducement of the arbitration clause in a valid contract, that clause, as well as other terms of the contract, must be enforced. *Sedco*, 767 F.2d at 1148.

> to Lloyds' excess coverage policy at the time of Heinhuis' injuries. *Should the district court find that NOPI was insured by the policy, then the dispute over coverage related to Heinhuis' suit will be subject to arbitration.*

959 F.2d at 554 (emphasis added). As in *Heinhuis,* the determination whether to compel arbitration in the present case should be limited to whether the petitioners were parties to the Sphere Drake policy. Since petitioners claim coverage under the policy, *Heinhuis* mandates that petitioners must arbitrate this insurance dispute.

Petitioners contend that the courts below erred in holding the arbitration provision enforceable because the insurance contract was not signed. Petitioners suggest that grammatical construction of the definition of "agreement in writing" supports their theory. Respondent disagrees. Petitioners' argument requires an awkward, illogical interpretation of the clear language of Article II, § 2. Petitioners assert that the word "or" is a "coordinating conjunction" which joins equal parts of a sentence. Based on this assertion, petitioners claim that the signing requirement applies equally to "an arbitral clause in a contract" and "an arbitration agreement." If that theory were true, the coordinating conjunction "or" in the second part of the definition of "agreement in writing" (i.e., signed by the parties *or* contained in an exchange of letters or telegrams") would compel a conclusion that an arbitral clause in a valid, but unsigned, contract could constitute an "agreement in writing" only if the contract was "contained in an exchange of letters or telegrams." According to petitioners' argument, an arbitral clause in a valid, but unsigned, contract would not be enforceable under The Convention if the contract were set forth in a single document, though it would be enforceable if the contract was contained in an exchange of letters or telegrams. It is ludicrous to contend that the enforceability of an arbitration agreement under The Conven-

tion should turn on whether the terms of an unsigned, valid contract are set forth in a single document, as opposed to being contained in an exchange of letters or telegrams. Clearly, this was *not* the intent of the drafters of the Convention. The drafters intended to allow enforcement of arbitration provisions in a valid contract, regardless of whether the contract was signed.

Relying on their strained grammatical construction argument, Petitioners also advocate a restrictive interpretation of Article II, § 2 of The Convention, suggesting that the types of arbitration agreements mentioned in that article are exhaustive and exclusive. However, that narrow interpretation is clearly contrary to the language of Article II, § 2. The description of "agreement in writing" under Article II, § 2 certainly is not restricted by the language of that article.[6] Article II, § 2 must not be read in a vacuum; rather, it must be read with reference to general principles of contract law and the liberal policy favoring arbitration, including the requirement that doubts concerning the arbitrability of a dispute should be resolved in favor of arbitration. *Sedco,* 767 F.2d at 1145.

Petitioners' interpretation of The Convention strains logic and common sense because there is no rational reason for an arbitration clause or other provisions in *any valid contract,* signed or unsigned, not to be enforced. The most logical, obvious interpretation of the grammatical construction of the "agreement in writing" definition under Article II, § 2 of The Convention was set forth by the district court and the Fifth Circuit. Specifically, as stated clearly and concisely by the lower courts, the definition of "agreement in writing" in Article II, § 2 of The Convention includes either (1) an arbitral clause

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[6] The article states: the term "agreement in writing" *shall include* "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." The article does not contain any language limiting an "agreement in writing" only to the examples listed.

in a contract; or (2) an arbitration agreement signed by the parties; or (3) or arbitration agreement contained in an exchange of letters or telexes. (*See* Petitioners' Appendices "A," 1a and "D," 15a.) It is undisputed that the applicable Sphere Drake insurance contract contained an arbitral clause.

Petitioners cite the cases of *Par-Knit Mills v. Stockbridge Fabrics Co.*, 636 F.2d 52 (3d Cir. 1980) and *Case International Co. v. T.L. James and Co., Inc.*, 907 F.2d 65 (8th Cir. 1990), in support of the assertion that "an agreement to arbitrate" has an "extraordinary character." (Petition, p. 9). Respondent does not take issue with this assertion. However, respondent points out that the above-cited cases *do not support* petitioners' erroneous claim that an arbitral clause in a contract must be signed; rather, the above-cited cases simply state that an arbitration agreement should be express and unequivocal. The instant case involves an arbitral clause in a contract as opposed to an arbitration agreement; however, the arbitral clause in the Sphere Drake/Marine Towing insurance contract was both express and unequivocal. Accordingly, the cases cited by petitioners have no relevance whatsoever to the case at issue.

Petitioners also argue that the opinion of the district court and the Fifth Circuit is contrary to the district court's opinion in *Sen Mar, Inc. v. Tiger Petroleum Corp.*, 774 F.Supp. 879 (S.D.N.Y. 1991). Although the opinion of the district court for the Southern District of New York is not controlling in the instant case, respondent maintains that it is not in conflict with the lower courts' rulings herein, as it is clearly distinguishable. In *Sen Mar*, the court found that *none* of the examples of "agreement in writing" under Article II, § 2 of The Convention had been satisfied: there was no valid contract, no agreement in writing to arbitrate, and no exchange of letters confecting an arbitration agreement. The court held that although the proponent of arbitration had proposed an ar-

bitration clause in a telex, the opponent had specifically disavowed the contents of that telex. 774 F.Supp. at 882-3. Thus, while the district court in the case at bar found two bases to satisfy The Convention's requirements for an "agreement in writing to arbitrate," neither of those bases existed in *Sen Mar*. Moreover, to the extent that *Sen Mar* requires a more restrictive reading of The Convention than applied by the lower courts in the present case, *Sen Mar* is inconsistent with the liberal policy favoring arbitration and the requirement that courts resolve all doubts in favor of arbitration. Consequently, *Sen Mar* should not guide this Court's review of the arbitration order in the present case.

Furthermore, petitioners argue that there is a question of fact as to their consent to arbitrate in the instant case. The facts establish that the terms and conditions of coverage were specifically requested by petitioners' London broker, Barrow, and petitioners are bound by Barrow's request for, and knowledge of, the contents of the policy, including the arbitration clause. Petitioners must accept both the favorable and less favorable portions of the contract which they seek to enforce. *See T & R Enterprises, Inc. v. Continental Grain Company*, 613 F.2d 1272, 1278 (5th Cir. 1980).

Finally, petitioners suggest that the district court and the Fifth Circuit's interpretation of The Convention definition of "agreement in writing" conflicts with the *Inter-American Convention on International Commercial Arbitration* ("Inter-American Convention"). Respondent maintains that this argument, which petitioner did not present to the district court or to the court of appeals, is irrelevant and erroneous. The Inter-American Convention is not the statute at issue here. Neither the language nor the interpretation of that statute has any bearing on or application to The Convention. Moreover, the Inter-American Convention has no relevance to the case at issue as it does not specifically refer to or include

arbitral clauses in contracts, but, rather, is limited to arbitration agreements.

In summary, the courts below were clearly correct in finding that the arbitration clause contained in a valid contract of insurance satisfied the definition of an "agreement in writing" under Article II, § 2 of The Convention.[7] Since the petitioners seek to enforce the contract, they must abide by the arbitration provision as well. Established principles of contract law, the federal policy favoring arbitration and the language of Article II, § 2 all support the district court's 26 February 1993 order compelling arbitration and the Fifth Circuit Court of Appeals' affirmation of that order. For these reasons, petitioners' application for a writ of certiorari should be rejected.

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[7] The district court also found that the definition of "agreement in writing" was satisfied in this case by Barrow's "slip," which the district court equated to the exchange of letters referred to in Article II, § 2 of The Convention. The district court found from the undisputed evidence before it that Barrow was an independent insurance broker, which, as a matter of Louisiana and general insurance law, imputed Barrow's actions and knowledge to Marine Towing. Thus, the court found that Marine Towing had, through Barrow, participated in the exchange of slips, binding it to the arbitration clause in the policy requested in Barrow's slip. Having found that there was a valid agreement in writing to arbitrate, the Fifth Circuit Court of Appeals did not reach the issue of whether an exchange of letters or telegrams occurred. *See* note 4, ***supra.***

CONCLUSION

The decisions of the district court and the Fifth Circuit Court of Appeals, holding that petitioners were bound by a valid and enforceable agreement in writing to arbitrate, were correct. Applying The Convention, the lower courts correctly found the existence of "an arbitral clause in a valid contract," and, therefore, properly compelled arbitration. Petitioners have presented no meritorious reasons for granting certiorari. Rather, the petitioners' arguments are weakly based on their erroneous, unsupported and illogical interpretations of The Convention's definition of "agreement in writing."

The decisions of the lower courts do not conflict with any decision of this Court or any other United States Court of Appeals on the matter presented in this case, nor does this case present any unsettled or important question of law for this Court to decide. For the reasons discussed, respondent, Sphere Drake, respectfully submits that this Court should deny petitioners' request for a writ of certiorari.

Respectfully submitted,

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